

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 BRIGHT RESPONSE LLC) (
5) (CIVIL DOCKET NO.
6) (2:07-CV-371-CE
7 VS.) (MARSHALL, TEXAS
8) (
9 GOOGLE, INC., ET AL) (APRIL 1, 2010
10) (11:30 A.M.

11 MOTION TO COMPEL HEARING
12 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
13 UNITED STATES MAGISTRATE JUDGE

14
15 APPEARANCES:

16
17 FOR THE PLAINTIFF: (See attached sign-in sheet.)

18
19 FOR THE DEFENDANTS: (See attached sign-in sheet.)

20
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25 (Proceedings recorded by mechanical stenography,
transcript produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated.

3 All right. Where are we on the motions to
4 compel?

5 MR. SPANGLER: Your Honor, Andrew Spangler,
6 on behalf of the plaintiff. We do not have it resolved.

7 THE COURT: All right. Let's hear it. I
8 mean, what's -- you know, what's the problem? What are
9 we -- I mean, what are we really fussing about?

10 MR. SPANGLER: What we're fussing about --
11 sorry, Your Honor. What we're fussing about is we
12 still don't have the code that we've asked from day
13 one --

14 THE COURT: Okay. What is it, and how does
15 it relate to this case exactly? Exactly what don't you
16 have?

17 MR. SPANGLER: Your Honor, well, part of it
18 is we don't know. We've had to go through every month,
19 every week, every review, and find out more stuff they
20 didn't produce. So it's reached the point now -- and
21 this is what's happened in other cases. It's three
22 months before trial, and we still don't have all the
23 code.

24 For example, for Google, we've specifically
25 accused AdSense for Search. We don't have all the code

1 for AdSense for Search. What has happened is we've
2 accused, for example, Mr. Verhoeven used an example of a
3 car. We accuse a car, a Volkswagen, we get the
4 carburetor six months ago. And we go, "Well, there's
5 two connections here. What are they? You didn't
6 provide them."

7 "Well, here's the muffler. Here's an engine
8 block."

9 Okay. Well, the engine block has lots of
10 connections. What goes to the engine block?

11 And for Yahoo, that's been exacerbated
12 because they violated the protective order and didn't
13 produce this in the ordinary course of the business. We
14 have no idea the structure and where they fit.

15 For Google, they've produced it, for
16 example, with what are called include statements in
17 files, and they didn't produce the include statements.
18 We have to go through and find those, send a letter and
19 say, "You didn't produce these. Please do it." And
20 it's over and over and over again.

21 And the goal is very simple. Hundreds of
22 thousands of costs that we've done in -- with our
23 experts. We still don't have all the code. We still
24 don't know how it all works, and we're three months from
25 trial.

1 So we're asking for -- for the accused
2 product, the code. They don't have to produce
3 historical versions because we've already reached
4 agreement on that, but we need the code. We've -- we've
5 tried to compromise. We've tried to narrow, and what's
6 happened is, is we've been -- the process has been
7 abused.

8 THE COURT: Okay. I think I understand the
9 fuss.

10 Has all the code for the accused products
11 been produced?

12 MS. AINSWORTH: Your Honor, this is Jennifer
13 Ainsworth on behalf of Google and AOL. Your Honor, all
14 of the code for the accused products has not been
15 produced.

16 THE COURT: Okay.

17 MS. AINSWORTH: The code for the accused
18 instrumentalities and functionalities has all been
19 produced.

20 What -- to -- to follow up on the example
21 that Mr. Spangler gave, they have accused a carburetor,
22 and they're asking for the code for the car, for the
23 entire car.

24 Your Honor has asked him to provide exactly
25 what they still need, and he can't do that. We have

1 tried to work those issues out and have worked all
2 through this case.

3 Your Honor, to start out with, the local
4 rules require that a party produce and disclose all
5 documents and information relevant to the claims or
6 defenses, and under Rule 3-4 in the patent rules, all
7 source code relevant to the accused instrumentalities
8 and functions.

9 When we got the plaintiff's contentions
10 originally, when Google and AOL did, we went through and
11 said, "We've got to get some more information from you
12 guys on what is really accused." They said they could
13 not provide us any more information, so we went
14 through, decided what was relevant, and produced it.
15 That started -- that process started almost a year ago
16 in May of 2009. They started reviewing the code after
17 that.

18 Your Honor, there have been requests made
19 for further details from the code, the majority of which
20 have not been relevant. And all of this information --
21 the example that Mr. Spangler gave with regard to
22 Google -- with regard to one part of the Smart Ad
23 selection system is not something that's relevant.
24 Google has produced all of the relevant code for the
25 accused instrumentalities.

1 What -- when we discussed this in response
2 to Your Honor's request in the last 15 minutes,
3 Mr. Spangler made clear that he is asking for all code
4 that could possibly exist with regard to anything that
5 is mentioned. And that reads out the relevance
6 requirement from our local disclosure rules.

7 THE COURT: Well, here's the problem, okay?
8 I mean, this isn't a car accident case. I mean, what
9 you're asking me to do if -- is accept your view of
10 what's relevant and what isn't relevant insofar as the
11 code is concerned. And I'm -- I'm not in -- inclined in
12 something that's as sophisticated a problem as source
13 code to just baldly accept one side's or the other
14 side's view of they don't really need this, or, yes, we
15 really do need this.

16 And what y'all are -- the position y'all are
17 putting me in is that I'm going to have to appoint a
18 source code expert to review all of the code and then
19 determine whether or not one side or the other is
20 overreaching in -- in either what they want to be
21 produced or what they don't want to be produced and then
22 tax the entire costs of that review against whichever
23 side is overreaching.

24 And it's -- I mean -- I mean, I'm not -- I'm
25 frustrated with the problem. I'm not frustrated with

1 you, but this is a recurring theme that I'm seeing in
2 these types of cases, and I -- and it's recurring
3 insofar -- it's been about the last six months. I
4 hadn't seen it before the last six months, but it's
5 starting to become a recurring problem.

6 MS. AINSWORTH: Your Honor, Google would
7 agree to that procedure to the degree that that's
8 something the Court's considering, but --

9 THE COURT: Well --

10 MS. AINSWORTH: -- in this situation, Your
11 Honor -- back up. Under the local rules, it always --
12 the local rules always put the burden on the disclosing
13 party, whether that be the plaintiff or the defendant,
14 to make the call as to what's relevant. And then the
15 other side can come back and say, "No, you've missed
16 something."

17 Well, when you look at what's happened in
18 this case with regard to the Google, what does the
19 evidence show us? The evidence shows us that Google has
20 produced 2.6 millions lines of code, more than we've
21 produced in any other lawsuit, first of all, which is
22 recognized by the plaintiff.

23 Second, if -- if you look at the question
24 about whether there's something missing, can the
25 plaintiff tell us there's anything missing? They can't.

1 And, second, what evidence is there that they have
2 gotten the information that they've needed, that they've
3 gotten the relevant information?

4 We look at their amended infringement
5 contentions. For almost every claim asserted, they have
6 referred back to source code. So that's evidence that
7 Google has produced the relevant code in this case.
8 What they're asking for is everything that could
9 possibly exist if they even name a product or service.
10 And that -- the problem is -- and I understand the
11 Court's frustration.

12 The problem is that totally reads out
13 the relevance requirement of the disclosure rules and
14 puts parties in a situation of being able to create
15 serious abuse by requiring source code production
16 potentially for an entire company just because of
17 something they mentioned with -- with no regard to
18 relevance.

19 THE COURT: Of course, he stipulated that
20 historical source code is not at issue, so it doesn't
21 really remove the relevancy requirement entirely, does
22 it?

23 MS. AINSWORTH: It does --

24 THE COURT: For instance, historical source
25 code, I think he's agreed, isn't relevant in this case,

1 or at least he's not seeking it.

2 MS. AINSWORTH: At least he's not seeking
3 it. But I don't think that necessarily reads out the
4 relevance requirement because it should only be for --
5 the stipulation is for those portions that we have
6 produced they're not seeking the -- the historical code
7 for those. I mean, we think it still has to be tied to
8 relevance.

9 And in -- in this case, Google has gone, we
10 believe, above and beyond providing relevant
11 information. Every time they've asked for something
12 else, whether it has not been relevant, we have
13 investigated every single request, most of which we have
14 produced, even though it wasn't relevant.

15 There have been a couple of times where
16 there's been something that fell so far outside of
17 relevance or was so extremely protected, that we talked
18 to them about it and said, "You don't need this
19 because," or "You don't want this because," and we've
20 worked it out. And there hasn't been a problem until
21 now.

22 And to conclude -- and we can answer any
23 more specific questions that the Court has.

24 THE COURT: Well, but --

25 MS. AINSWORTH: The plaintiff --

1 THE COURT: -- but there -- there has been
2 other problems, hasn't there? I mean, not in this case
3 yet, but, I mean, there have been other problems.

4 MS. AINSWORTH: There were problems in
5 the -- in the PA Advisors case.

6 MR. PERLSON: Your -- Your Honor, sorry to
7 interrupt here. It's David Perlson, but Ms. Ainsworth
8 wasn't our local counsel in -- in the PA Advisors case,
9 and so I wanted to address that, if that's okay.

10 THE COURT: That's fine.

11 MR. PERLSON: Okay. In the PA Advisors
12 case, plaintiff made similar complaints. And what Judge
13 Rader did in that case -- well, first of all, this --
14 what Judge Rader did in that case is he said -- in
15 response to plaintiff's request, basically, that they
16 get everything regarding the accused products,
17 basically the same thing they're asking for here, Judge
18 Rader said -- "I mean, I can state I want everything
19 that Google's got. You're not going to get that. So
20 tell me what you want and make it specific."

21 Whenever plaintiff has done that, we have,
22 as Jennifer -- as Ms. Ainsworth said, we have
23 investigated and cooperated with them. If you note in
24 their --

25 THE COURT: Well, when they tell you what

1 they want, have you produced everything that they've
2 asked for?

3 MR. PERLSON: As far as I know, there are
4 two instances -- two specific instances in which -- that
5 we haven't been able to resolve the dispute, one of
6 which is regarding a request regarding the refill code
7 which we just frankly don't understand. We thought that
8 we produced all the code regarding refill that was
9 relevant or that related to a request of refill. And
10 they seem to be requesting it. We asked them to explain
11 it. They refused.

12 There was another line of code -- aspect of
13 code regarding a map engine that relates to how data is
14 stored. That does not -- from our review of their
15 contentions, we can't tell at all --

16 THE COURT: What --

17 MR. PERSON: -- that's relevant.

18 THE COURT: -- type of data?

19 MR. PERLSON: I'm sorry?

20 THE COURT: What type of data?

21 MR. PERLSON: It's data that's used by the
22 SmartASS system, which is one of -- part of what's
23 accused, but it doesn't -- it's not related to how
24 SmartASS uses the system or uses this data which is
25 accused.

1 It relates to how the system that the
2 SmartASS server calls, how it stores the data. It's
3 completely irrelevant. And all we asked them, we just
4 said, "Look, we're -- we're willing to talk to you.
5 Just please -- just explain to us why you think it's
6 relevant." They refused.

7 And in -- in their initial motion, they
8 raised two specific issues. They didn't ask for all the
9 source code in their initial motion. That's not really
10 what they requested. The -- the request was all code
11 related to SmartASS and all code related to
12 normalization. We pointed out in our opposition, we've
13 produced that stuff.

14 And if you look at their infringement
15 contentions, they have source code related to all of
16 it. And then faced with the evidence that we've
17 actually either produced or offered to cooperate on
18 the very, very minimal specific pieces of code that
19 they are still raising, they now come back and say,
20 "Oh, we need all," pointing to this PA Advisors case
21 again.

22 But, again, it's -- the same -- and another
23 thing that -- that Judge Rader actually pointed out the
24 problems that we had in that case because we had a hard
25 time finding out what code was relevant because they

1 were having a hard time providing their contentions.

2 Judge Rader said, "I'm seeing a little
3 pattern here that goes back to before I came in the case
4 where you give contentions, you conduct discovery, you
5 amend contentions, you request more discovery, you amend
6 contentions, you request more discovery, and then based
7 on discovery, you request more discovery. When does
8 this end?"

9 And what Judge Rader did was to simply say,
10 "Plaintiff, tell -- say specifically what you need.
11 Google, you know, work it out with them in response to
12 that."

13 We stand ready to do that as we have been in
14 the case. We -- we have produced code, as far -- as far
15 as we can tell, for all relevant aspects of the code.
16 You look at their contentions. They cite code for
17 almost every single element. So that's the best proof,
18 Your Honor, that Google has done everything.

19 And -- and just to clarify one thing, what
20 Ms. Ainsworth had said, is that Google, Ya -- and Yahoo
21 would both agree to the proposal regarding this third
22 party. I understand that that's not the ideal proposal.
23 We think the motion should be denied, but, you know,
24 both -- all parties would agree to that.

25 THE COURT: All right.

1 MR. SPANGLER: Your Honor, may I have a
2 short rebuttal?

3 THE COURT: Yes.

4 MR. SPANGLER: Thank you.

5 And do I have your permission to put up a
6 few documents?

7 THE COURT: Well, before you do that.

8 Ms. Ainsworth, he interrupted you. Did you
9 have anything else you wanted to tell me?

10 MS. AINSWORTH: I had one point I had wanted
11 to make, just in -- in conclusion, which was that I
12 thought -- with regard to the motion against Google, the
13 main point that the plaintiff was trying to make they
14 made in their first substantive sentence which was that
15 we're filing this motion so that you can't later say we
16 didn't file a motion.

17 And there was not a real pending dispute
18 over particular sections of code because every time
19 they've asked for particular sections of code, we've
20 worked with them for months on getting them everything
21 that they wanted. But that's why the motion was really
22 filed, not because there was a serious dispute. And I
23 thought that there -- they were really rather
24 straightforward about that, which is not the purpose of
25 the discovery and disclosure rules or of the motion to

1 compel practice.

2 THE COURT: Well, but neither is it the
3 purpose to have these things linger on for months. I
4 mean, that's --

5 MS. AINSWORTH: That's correct, and --
6 and we don't think that it should have lingered on
7 for months. We think that the original production
8 was what was relevant. And as in most productions I've
9 been involved with, there's usually one or two
10 follow-ups where they say, "Hey, you forgot this, or we
11 think that this links to something else, produce it."
12 And that usually occurs within a reasonable period of
13 time.

14 We think what's gone on since then has been
15 information that's not been relevant. Anything that
16 links or calls to something else, they've asked for, but
17 it doesn't mean that it's relevant.

18 So thank you, Your Honor.

19 THE COURT: All right. Appreciate it.

20 MR. SPANGLER: Your Honor, let me address
21 really quickly -- but, first, to clarify for the Court,
22 the issues with Google and their conduct are very
23 different than that with Yahoo. Yahoo's conduct is far
24 worse, and I'll -- I'll bring that to the Court's
25 attention.

1 Do I have permission to put the document I
2 showed you up on the screen?

3 MR. PERLSON: Yes.

4 MR. SPANGLER: Thank you. They said -- for
5 example, there's still some stuff they haven't produced,
6 even though everything we've asked for has been
7 produced. One of the accused products is called
8 AdWords, okay? And what they mentioned -- part of
9 AdWords is a SmartASS server, okay?

10 Is the ELMO working here?

11 So this is the overall system architecture
12 for AdWords and the components of the SmartASS system.
13 They're the SmartASS mapper. We have the SmartASS
14 server. We asked for the map engine. They go, "It's
15 not relevant. Why do you need it?" Well, it's
16 integrated with the two servers and map. We need to see
17 what exactly it does. Haven't gotten that.

18 There is no question that we have raised
19 some issues since the motion to compel was filed.
20 That's because it keeps changing. There's no question
21 that we had the include statements on very relevant
22 files, files they produced at the very beginning, but
23 they -- I guess they didn't have an engineer go through
24 and actually review it. They just went and grabbed it
25 and threw it out there.

1 The fact that they've done 2.5 million lines
2 of code, the volume, to me, doesn't matter.

3 And in the PA Advisors case -- I'm glad they
4 brought that up, because we are still getting relevant
5 code after expert reports were due and after summary
6 judgment motions have been filed against us. And the
7 fact that source code -- and to address
8 Ms. Ainsworth's point -- reviewing source code, this
9 isn't my first rodeo either -- either. I mean, I've
10 reviewed it with an expert side-by-side, so I know how
11 it works and I know that sometimes there's follow-up.
12 I've never seen this much follow-up.

13 The protective order in this case was
14 entered nearly two years ago, agreed protective order,
15 and we still didn't get it all. And that's for Google,
16 explain that.

17 But I want to raise some specific issues
18 with respect to Yahoo if the Court will allow me.

19 One, not only do we not have the source code
20 for Yahoo, that they've engaged in the same sort of
21 conduct, but they've refused to produce it in the
22 ordinary course of business which, again, is a violation
23 of that protective order. It says you have to do it
24 that way.

25 They've disabled search features on their

1 review computers. Again, a violation of the
2 protective order. They just start doing it, don't tell
3 us. But more importantly is the structure. If the
4 Court wants to find, for example, a particular song on
5 his computer, you can go to the C drive, you can go to
6 program files, you can go to iTunes, you can go to the
7 library. When you finally get there, at the very top is
8 an address bar with all the layers that took you to that
9 bottom part, right? And that helps tell you where
10 iTunes fit -- that music file fits with the overall
11 system, what subset it's in, how it's tied. They didn't
12 do that. They didn't -- we don't know how it's set up.

13 Now, the rules require them to produce in
14 the ordinary course of business. In their motion,
15 they're saying it's too problematic now. It's too
16 difficult now because we've done a rolling production.
17 If they'd done it from the very beginning, instead of
18 waiting until October of last year to start, then it
19 wouldn't have been overly burdensome.

20 So, again -- and -- and their perception of
21 the local rules, I completely disagree with. They have
22 in their brief any suggestion by Bright Response that
23 the Court's order -- that was the one from November
24 5th -- was broader as inaccurate. Yahoo was only
25 ordered to produce specifically listed source code. So

1 Yahoo's position is when the Court says, "You need to
2 produce this code that they're asking for," it means
3 they can ignore the other Court's order that says,
4 "You'll produce mandatory disclosure requirements.
5 You'll produce it."

6 Now, we've been trying to work with them.
7 The historical code is all relevant. We said, "Okay, we
8 don't want you to have to produce all that extra stuff.
9 We'll -- we'll agree to a stipulation." We went to them
10 to try and save them from that extra burden so we didn't
11 have to do that.

12 Now, they say they'll jump all over the
13 Court's offer of hiring an extra expert. If the Court
14 wants to do that, of course. You're the Court. We
15 don't know if we're overreaching or not because we
16 didn't get it. And now they've waited until the last
17 second and in fact, admonished me, because I made the
18 call on behalf of my client to file, for filing so soon.

19 We're three months from trial, and we still
20 don't have it all. And they're putting the burden on us
21 to identify still what's missing. We don't know because
22 they didn't produce it all, and they didn't start until
23 August of last year for Google and October of last year
24 for Yahoo.

25 THE COURT: Response from Yahoo?

1 MR. PERLSON: I just want to correct one
2 factor -- misrepresentation. We actually made our code
3 available I believe it was April or May, not August.
4 They made that misrepresentation in their briefing.
5 He's done it here again.

6 MR. SPANGLER: Can I address that one
7 specific point, Your Honor? Or -- I'll let it go.

8 MR. WHITE: Your Honor, if may I respond on
9 behalf of Yahoo?

10 THE COURT: Yes.

11 MR. WHITE: I want to pick up with his last
12 point first because we were here previously on a motion
13 to compel, and at that time, we represented to the Court
14 that we believed that we had produced all of the
15 relevant source code, and there was some discussion back
16 and forth.

17 And you told plaintiff's counsel that they
18 were to give us a list of things that they thought were
19 missing. And you said they needed to be specific, and
20 that when we left, Yahoo -- when we left that hearing,
21 we would know what additional files the plaintiff was
22 requesting.

23 We got that list. We complied with the
24 order, and we produced that code. There have been
25 additional follow-ups since then for additional code.

1 We've never refused any of those. We've -- we've looked
2 for, identified, and produced any relevant code that
3 they've asked for after that initial order that you
4 gave.

5 So, again, we believe that all the relevant
6 code has been produced, and we've gone beyond -- above
7 and beyond that to produce additional code. The same is
8 true for Yahoo that it is for Google, that this case has
9 involved more production of code than any other case.
10 They've spent hundreds of days reviewing it. They've
11 got full access -- we will give them access to anything
12 else that they deem relevant that they think they need.
13 We think they have it all already.

14 We're happy to provide them and talk with
15 them further about specific requests, but at this point,
16 we don't have it. All we have is that we want
17 everything. We think they have what they need, and
18 we're happy to work with them further if they think they
19 need additional things. But at this point, we're just
20 at -- at our wit's end as to what else to give them.

21 THE COURT: Well, does the protective order
22 require it to be produced as it's kept in the ordinary
23 course of business?

24 MR. WHITE: It does, and that's --

25 THE COURT: Was it -- well, and was it

1 produced?

2 MR. WHITE: It was. Your Honor, it was. I
3 know they keep talking about a direct restructure. As
4 we told them before, there is no index of our code. We
5 have individual sets of code that reside on servers.
6 We've pulled that code off. We haven't stripped it out
7 or redacted. There's internal references to code
8 in the code. If someone calls for another file, it's
9 referenced there, and so you've got one piece of code
10 that may call another piece of code, but it -- it's
11 mentioned in a call. We haven't redacted that or
12 somehow impeded their ability to receive the code.
13 They've got all the sections of code. They can figure
14 out how it works together.

15 Their complaint is that we haven't given
16 them some index that we simply don't have, and I think
17 we've explained to them before. So our position is
18 that, yes, we have produced it as it's kept in the
19 ordinary course of business.

20 THE COURT: Okay. All right. Reply?

21 MR. SPANGLER: Your Honor, first of all,
22 to be clear, we're not asking for an index. This is why
23 every time we've asked for a directory, the code be
24 produced in its directory structure, that's what they've
25 come back with.

1 I'm not asking for an index of all their
2 files. What I'm asking for, instead of taking a
3 specific picture and then putting it on a disk without
4 me knowing where it came from, that that's not how it's
5 kept in the ordinary course. You copy it, you paste it
6 as part of that overall directory, it must be served
7 on -- it must be located on their server. I assume they
8 don't have five million lines of code just sitting
9 horizontal. It's not laying horizontal. We're not
10 asking for an index. We're asking that it be produced
11 in the ordinary course.

12 They didn't do that. They've still not done
13 that despite our request. We stopped reviewing
14 actually, Your Honor, a couple of weeks ago because we
15 were -- the money was crazy, but they had turned off the
16 search features on the computers.

17 I mean, I think it's great that they can
18 stand here and say they've got lots of code in the
19 contentions. That doesn't mean we have all their code.
20 It means we found some. I think it's great that they
21 say, "Yeah, we've produced what we think we have," but
22 every time they say they're done, every time, we found
23 more code. More code that specifically call -- and this
24 is Google and Yahoo. They've represented over and over
25 again to us, "We think you have everything. We think

1 you have everything." We can't wait any longer.

2 And in another case with Judge Bush, I was
3 admonished for not moving faster and for sitting on my
4 rights. That's why we're here.

5 THE COURT: Well, is there always going to
6 be some other feature or place in the code that's being
7 called by what you've had produced to you, if you've
8 had -- if you've not had all of it produced to you?

9 MR. SPANGLER: I'm sorry, re -- reask that
10 the question.

11 THE COURT: Well, you just said every time
12 you get something, there -- you know, there's a call to
13 some other thing that you haven't gotten -- hadn't had
14 produced to you.

15 And my question is, isn't that always going
16 to be the case in a situation where you've received a
17 portion of the overall code, as opposed to all of the
18 overall code?

19 MR. SPANGLER: It depends. It depends on
20 what code is produced.

21 And early on, Your Honor, when we started
22 getting the code, we tried to narrow which includes we
23 asked for, okay? We reached a point with our expert --
24 and if the Court wants to bring in our expert and have
25 her sit at the witness stand and you ask questions, we

1 are glad to do that.

2 She -- one, said it's not as unwieldily as
3 they say, although the computers that -- that Yahoo sent
4 that were antiquated caused real problems, that now due
5 to speed stuff, we're three months away. Expert reports
6 are probably going to be due in six weeks. We need to
7 have it all. So, yes, in this case, yes. If we had
8 gotten it when we were supposed to, it's possible that
9 we wouldn't even be here and we would have had it worked
10 out.

11 But time constraints and what's happened in
12 other cases and Judge Bush's order forced us to step
13 this up. And I'd like to address the April/May issue.
14 The April/May issue came about because Google said, "You
15 only get one review." And it's based on statements that
16 I made at a hearing.

17 Now, Mr. Perlson is shaking his head and
18 making negative comments, but he wasn't at the hearing.
19 I argued the hearing in front of Judge Folsom. And the
20 issues was there are going to be some features in the PA
21 Advisors case and some in this case that were slightly
22 different, okay? And under the current protective order
23 where Google was not agreeing to Dallas, our expert was
24 going to have to look at the information here for Bright
25 Response and then go to California.

1 Now, the parties were going back and forth
2 in e-mail correspondence on "When you say one review,
3 what do you mean?" "Well, it means one review." "Does
4 that mean we have to sit at one time and do them all?"
5 "It means one review."

6 Finally, the parties worked it out and said,
7 "Okay. Yeah, you can have it." But we weren't going to
8 access it. We weren't going to review it unless we knew
9 we were going to get multiple shots at it because a
10 review that big takes time.

11 So, yes, technically, it was in a file on a
12 computer before August, but it didn't start up until
13 August. And, of course, Yahoo, it didn't start until
14 October.

15 THE COURT: All right. I'll give you an
16 order as quickly as I can.

17 MR. PERLSON: Excuse me, Your Honor. We
18 have one more housekeeping issue.

19 MR. VERHOEVEN: I don't know if this needs
20 to be decided right now, but since I'm here, Your Honor,
21 I just wanted to note that the trial -- jury selection,
22 I believe, has been set for July of this year, and I
23 just wanted to let Your Honor know that I -- there's a
24 case, Acqis, A-c-q-i-s, versus IB -- and one of the
25 defendants is IBM, which is a client of mine. And it's

1 before Judge Davis.

2 The Markman is set for the week after the
3 jury selection, so we submitted a paper sug --
4 suggesting that we set the trial for the last two weeks
5 in July which I could do, but if it gets set for that
6 following week, I'm going to have a conflict with Judge
7 Davis and the Markman.

8 THE COURT: Well --

9 MR. VERHOEVEN: July 8th is the Markman.

10 THE COURT: The rule around here is that
11 I'll yield to Judge Davis' settings, but if I have to
12 give you -- I mean, if I have to --

13 MR. VERHOEVEN: I'm not sure it's a problem
14 at all because I know the last trial we did, we did the
15 jury selection and did the trial three weeks later.

16 THE COURT: That's -- that's --

17 MR. VERHOEVEN: I just wanted --

18 THE COURT: I mean, I'll -- I'll schedule
19 the trial around the Markman hearing. I don't know if
20 I'm going to schedule it for the end of the -- end of
21 the month. I may just take a day off or something.
22 That way you'll be able to argue your Markman hearing in
23 front of Judge Davis.

24 MR. VERHOEVEN: Thank you, Your Honor.

25 MR. SPANGLER: Thank you.

1 THE COURT: Okay.

2 COURT SECURITY OFFICER: All rise.

3 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a
true and correct transcript from the stenographic notes
of the proceedings in the above-entitled matter to the
best of my ability.

SHELLY HOLMES	Date
Deputy Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/10	